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No. (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

SHIRLEY A. ASHCRAFT,
As Personal Representative
of the Estate of Edna P.
McGlothin, Deceased

Petitioner

v.

VILLAS WEST II OF
WILLOWRIDGE HOMEOWNERS
ASSOCIATION, INC.

Respondent

On Petition For Writ Of Certiorari
To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED

Does the Homeowners Association of 149 private individuals, commit a discriminatory housing practice when it enforces a restrictive covenant prohibiting renting so as to make unavailable and to deny dwellings within the subdivision to 56% of all racial minority householders (including 54% of all African American householders) in the community?

Is McGlothin who is aggrieved by the discriminatory housing practice of a group of private individuals required to prove as a condition of recovery that the group of private individuals had available to them an equally effective, non-discriminatory alternative to maintain property values?

Does the purpose of the Homeowners Association to protect property values by a practice which restricts 56% of all racial minority householders from the subdivision take precedence over the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States?

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Statement Of The Basis For Jurisdiction In The United States Supreme Court

McGlothin seeks review of the decision of the Indiana Supreme Court granting transfer with opinion entered May 15, 2008.

The Indiana Supreme Court denied rehearing on October 1, 2008. Appellant's Appx. p. 132.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the decision of the Indiana Supreme Court on writ of certiorari is 28 U.S.C. 1257.

Statutes Involved In The Case

Applicable provisions of 42 U.S.C. 3601, et seq. read:

Sec. 800. [42 U.S.C. 3601 note] Short Title
This title may be cited as the "Fair Housing Act".

Sec. 801. [42 U.S.C. 3601] Declaration of Policy
It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Sec. 802. [42 U.S.C. 3602] Definitions
As used in this subchapter–

* * *

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

* * *

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 [of the United States Code], receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, or 818 of this title.

* * *

(I) "Aggrieved person" includes any person who–

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured

by a discriminatory housing practice that is about to occur.

* * *

Sec. 804. [42 U.S.C. 3604] Discrimination in sale or rental of housing and other prohibited practices

As made applicable by section 803 of this title and except as exempted by sections 803(b) and 807 of this title, it shall be unlawful–

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

* * *

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

* * *

Sec. 813. [42 U.S.C. 3613] Enforcement by Private Persons

(a) Civil Action. –

(1)

(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a

conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

* * *

(c) Relief Which May Be Granted. --

(1) In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs . . .

STATEMENT OF THE CASE

Appellant's decedent Edna McGlothin (herein "McGlothin") is the owner of a dwelling in Villas West II Subdivision, Kokomo, Indiana, and as such is a member of Villas West II of Willowridge Homeowners Association, Inc. (herein "the Association"). On October 10, 2002, the Association filed a complaint against McGlothin in the Howard Superior Court, Kokomo, Howard County, Indiana, alleging that McGlothin was violating a covenant against leasing her dwelling and requesting injunctive relief that McGlothin stop renting and

evict her tenant. Appendix, p. 1. McGlothin first raised the federal questions sought to be reviewed by her counterclaim filed January 10, 2003 that the covenant against leasing "evidenced an intention to make a preference, limitation, or discrimination among persons who could occupy dwellings within the subdivision based on race, color, sex, familial status, or national origin," and that the covenant "has a discriminatory effect on the availability of housing within the subdivision in violation of the Fair Housing Act." Appendix, p. 35, 41. McGlothin asked that the covenant be declared void in violation of the Fair Housing Act.

The federal questions sought to be reviewed were first raised by McGlothin's counterclaim to the court of first instance, the Howard Superior Court, Kokomo, Howard County, Indiana, and were thereafter raised in McGlothin's Appellee's Brief to the Indiana Court of Appeals, by McGlothin's Brief in Response to Petition Seeking Transfer to the Indiana Supreme Court. They were presented in oral argument before the Indiana Supreme Court and in McGlothin's Petition for Rehearing to the Indiana Supreme Court.

Issues were tried to the Howard Superior Court on October 14 and 15, 2004. The Decision of the Court containing Findings of Fact, Conclusions and Judgment declaring the covenant against leasing void and of no force and effect was entered March 10, 2005. Appendix, p. 46.

The Association raised this issue to the Indiana Court of Appeals,

"Whether the trial court's judgment that

> the restrictive covenant against leasing violated the Fair Housing Act, 42 U.S.C. §3601-3619, is clearly erroneous."

The Indiana Court of Appeals affirmed the trial court's judgment declaring the covenant void on January 30, 2006. Villas West II of Willowridge Homeowners Association v. Edna McGlothin, 841 N.E. 2d 584, 608 (Ind. Ct. App. 2006). Appendix, p. 60.

The Association filed Petition to Transfer to the Indiana Supreme Court. On May 15, 2008, the Indiana Supreme Court reversed the decision of the Indiana Court of Appeals and the judgment of the trial court on McGlothin's counterclaim of disparate impact and remanded for reconsideration McGlothin's claim of intentional discrimination. Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 2d 1274, 1285 (Ind. 2008). Appendix, p. 110.

The Indiana Supreme Court found the trial court's Findings of Fact Number 33 to be clearly erroneous. That Findings of Fact reads,

> "33. However, the Declaration of Covenants contains numerous provisions requiring proper maintenance; these include the following, which are included herein by reference:
>
> Article V. Sections 1
> Article V. Sections 2
> Article V. Sections 2-A
> Article IX. Sections 3(a)
> Article IX. Section 3(c)

Article IX. Section 3(d)
Article IX. Section 3(e)
Article IX. Section 3(f)
Article IX. Section 3(g)
Article IX. Section 3(I)
Article IX. Section 3(j)

> The Plaintiff has, by these provisions, more than adequately assured a neat, clean and visually attractive environment, and a high degree of property maintenance. The Defendant would still be held to these requirements even while renting her home. Therefore, the Plaintiff's justification for the no-rent provision lacks a factual basis, and is mere subterfuge, rendering said provision unnecessary and useless."

The Indiana Supreme Court considered the case as one of disparate impact and held Finding of Fact Number 33 to be clearly erroneous on the basis that the other covenants cited by the trial court were not "equally adequate to maintain property values" as the no-rent covenant. "Because Plaintiff (McGlothin) points to no equally effective, less discriminatory alternatives to the defendant's (Association's) legitimate nondiscriminatory policy, that policy does not support a disparate impact FHA violation, even if it has a disparate impact on a protected class." Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E.2d 1278, 1284 (Ind. 2008) rehearing denied. Appendix, p. 127.

McGlothin again raised the question of discriminatory impact to the Indiana Supreme Court

in her Petition for Rehearing. McGlothin's Petition for Rehearing was overruled without opinion on October 1, 2008. Appellant's Appendix p. 132.

Facts Material to Consideration Of the Question Presented

Facts material to consideration of the disparate impact on persons of different races and discriminatory impact which the restrictive covenant has on the community are set forth in the trial court's Decision, Findings of Fact and Conclusions. The Findings of Fact and Conclusions appear at Appendix, p. 46 and are set forth verbatim in the decision of the Indiana Court of Appeals. Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 841 N.E. 2d 584, 589 (Ind. Ct. App. 2006). Appendix, p.60.

The following facts are material for consideration in support of this Petition.

Villas West II Planned Unit Development of Willowridge Subdivision ("Villas West II") was developed by the Jim Bagley Construction Co., Inc. Tr.p.151, l. 25-p.152, l. 2. The subdivision is located in the City of Kokomo, Howard County. There are 149 lots in Villas West II. Tr.p.62,l.22-p.63, l.6.

On April 2, 1992, the developer published and recorded covenants for the Villas West II of Willowridge Homeowner's Association, Inc. ("the Association") which contain the following provisions:

> "Lease of Dwelling By Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of owners with regard to

financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family." Amended Declaration of Covenants. Appendix p. 28.

The covenants prohibit all renters from living in the neighborhood. Tr. p. 333, ll. 20-24; Tr. p. 349, ll. 19-22. Therefore, the covenants remove housing units within Villas West II from the rental market.

The Associations's reason for excluding renters from the subdivision is that the covenants have an affirmative effect on property values, meaning that they either increase or maintain property values. The reasoning is that, in most cases, homes which are rented in neighborhoods which allow renting are not as well maintained as homes which are owner occupied. Tr. P. 65, l. 24 - p.66, l. 11.

Jim Bagley Construction Co., Inc. advertises Villas West II as part of its "Willowridge Community" as having city school system, city water, city sanitary sewers, city fire protection, city police protection, wide city streets, free city trash pick-up. The advertisement describes the subdivision as "Restricted - your investment is protected here." Exhibit U.

The word, "restricted," is defined by Webster's Third International Dictionary (1993), as "limited to the use of a particular class of people or specifically excluding others (as members of a class or ethnic group felt to be inferior) (a - residential area) (- hotels..." Other dictionary definitions include" ... limited to white Christians," and "...limited to or

admitting only members of a particular group or class, esp. white gentiles." Exhibit DD.

There are two (2) known African-American householders who own homes in Villas West II. Tr. p. 320, ll. 3-6; Tr. p. 325, ll. 18-21. With 149 lots in Villas West II, the racial mix of Villas West II is 98.7% white homeowners to 1.3% African-American homeowners. According to the U. S. Census Bureau 2000 Census the population of the City of Kokomo is 46,113. 39,242 of those are white persons and 6,023 are persons of races other than white. 4,770 are classified as African-American. The racial mix of the City of Kokomo is 86.69% white to 10.54% African-American and 2.77% other racial minorities. Exhibit R, DP-1.

2,080 or 44% of the African-American population resides in Census Tract 2, which is a relatively small area located east and northeast of Kokomo's downtown business area. Exhibit R, H11 , H12B. The area is designated by the City of Kokomo as a low-moderate income area. Exhibit S. In that Census Tract 370 units are renter occupied and 519 are owner occupied by African-American householders. Exhibit R.

In the City of Kokomo, there are 1,925 housing units which are occupied by African-American householders. 889 of those are occupied by householders who own units and 1,136 are occupied by householders who rent units. 54% of African-American householders in the City of Kokomo rent their dwellings. Exhibit R, H 14; Exhibit CC. The average household size of housing units occupied by African-American householders is 2.4 persons.

Exhibit R, H12B, 1,036 X 2.4 = 2,486 persons live in African American rented housing units. The covenants effectively exclude 1,036 African American householders, that is 54% of all African American householders, representing 53% of the African American population, from the subdivision. Exhibit CC.

In the City of Kokomo there are 2,602 housing units which are occupied by racial minority householders. 1,156 of these are occupied by householders who own units and 1,446 of those are occupied by householders who rent units. 56% of all racial minority householders in Kokomo rent their dwellings. All of those racial minority householders are excluded from the subdivision. Exhibit R, H14, Exhibit CC. Appellee's App. pp. 4 & 19

There are 18,827 housing units which are owned or rented by white alone householders. 6,431 are renter occupied. 6,431 ÷ 18,827 = 34% of white alone householders are excluded from the subdivision by the covenants. The covenants exclude 56% of racial minority householders and only 34% of white householders from the subdivision. African American householders in Kokomo are far more likely to rent their homes than white householders. For example, comparing 30 year old persons with $40,000 per year income, an African American person has a 68% chance of renting a home as compared to a white person who has only a 34% chance of renting a home. Tr. P. 273, l. 23- p.274, l. 18.

By the Association's evidence, 27% or 28% of African American households have income sufficient to rent homes in Villas West II if such homes were

available. Exhibit 4. Tr. p. 73, l. 3 - p. 74, l. 17.

ARGUMENT

McGlothin Made Prima Facie Cases of Discriminatory Impact and Disparate Impact.

The restrictive covenant in question reads,

> "Lease Of Dwelling By Owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of owners with regard to financially responsible residents, lease of a Dwelling by an Owner, shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family." Findings of Fact No. 3, Appendix, p. 47.

Villas West II of Willowridge Homeowners Association, Inc. is an association of the 149 private persons who own homes in the Villas West II subdivision. The Villas West II subdivision is advertised as having city school systems, city water, city sanitary sewers, city fire protection, city police protection, wide city streets, and free city trash pickup.

By the restrictive covenant the 149 members of the Association segregate themselves as homeowners who occupy their dwellings from all persons who rent dwellings and persons who occupy rented dwellings in the City of Kokomo. The racial mix of the Association is 98.7% white to 1.3% African American. 56% of all racial minority householders rent their dwellings. 54% of African American householders

rent their dwellings. 53% of the African American population of Kokomo live in rented dwellings. The covenants prevent all of those minority persons from living in the subdivision and enjoying the advertised advantages. That is the case for discriminatory impact on the community. The case for disparate impact is made by adding the fact that only 34% of white householders rent their dwellings.

The case for disparate impact is made stronger by the testimony of Dr. Nathan Lauster, a sociologist with the Minnesota Population Center. The Minnesota Population Center is the preeminent center for dealing with Census data in the United States. Based on his analysis of the statistical data, Dr. Lauster concluded that the no-rent covenant has a major effect on the racial minority householder because a racial minority householder is far more likely to rent than to own regardless of income and age. Tr. p. 279, ll 6-13. Dr. Lauster compared 30 year old persons with $40,000 per year income and concluded that an African American person has a 68% chance of renting a home as compared to a white person who has only a 34% chance of renting a home. Tr. p. 273, l. 23-p.274, l. 18; Findings of Fact No. 26, Appendix, p. 54.

The "evidence presented at trial establishes that McGlothin made a significant statistical showing of disparate impact." Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin, 841 N.E.2d 584, 604 (Ind. Ct. App. 2006). Appendix, p. 98.

The Association acts unlawfully under 42 U.S.C. 3604(a) when it enforces a restrictive covenant which make unavailable and denies dwellings within the

subdivision to the protected class of 1,446 racially minority householders who rent their homes in the City of Kokomo. The Association acts unlawfully under 42 U.S.C. 3604(b) when it makes, prints and publishes its restrictive covenant in its Amended Declaration of Covenants which appear as public records in the Office of the Recorder of Howard County. Appendix, p. 5. By the provisions of the Fair Housing Act, the enforcement of the restrictive covenant and the making, printing and publishing of the restrictive covenant are discriminatory housing practices under 42 U.S.C. 3604. McGlothin claims to have been injured by the discriminatory housing practices in that the practices prevent her from renting her dwelling. That makes McGlothin an aggrieved person under 42 U.S.C. 3602(I). McGlothin is asking that the covenant be declared void pursuant to 42 U.S.C. 3613(a)(1)(A) and 42 U.S.C. 3613(a)(2)(c).

The Covenant Perpetuates Segregation And Thereby Prevents Interracial Association.

If the enforcement of the restrictive covenant perpetuates segregation and thereby prevents interracial association, it is considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups. Metropolitan Housing Development v. Village of Arlington Heights, 558 F. 2d 1283, 1290 (7 Cir. 1977), (hereinafter "Arlington Heights II)").

The communities involved are the racially

minority householders who rent homes in Kokomo, householders who own homes in Villas West II, racially minority persons who live in rented homes in Kokomo, and the Kokomo community. Census Tract 2 in the City of Kokomo is a low to moderate income area and has a relatively high concentration of black population. Census Tract 2 is located in northeast downtown Kokomo. Tr. p. 146, L. 25-p. 147, l. 9; Exhibit S. Of the 889 units which are owned by African American householders in Kokomo, 534 are in Census Tract 2. Exhibit R, Table H14, H11. That is, 60% of all African American householders who own homes, own their homes in Census Tract 2. That means that only 40% of African American owned homes are outside of Census Tract 2. On the other hand, of the 1,036 African American renter occupied units, only 370, or 36%, are in Census Tract 2. Exhibit R, H14, H11. That means that 64% of African American householders who rent, rent units outside of Census Tract 2. With 64% of African American rental units outside Census Tract 2 representing 1,591 persons, and only 40% of African American owned homes outside of Census Tract 2, representing 893 persons, it is apparent that the incidence of interracial association between white persons and African Americans outside Census Tract 2 is much greater through African American householders who rent than through those who own homes. To put it another way, the threat of integration to a 98.7% white community such as Villas West II is far greater through the rental market than through the ownership market.

"Conduct that has the necessary and

> foreseeable consequence of perpetuating segregation can be as deleterious as purposeful discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns." Arlington Heights II, supra. 1289, Traffriante v. Metropolitan Life Insurance Company, 409 U.S. 205, 211, 93 S. Ct. 3645, 34 L. Ed. 2d 415 (1972) citing 114 Cong. Rec. 3422 (remarks Sen. Mondale).

By limiting occupancy to owners and members of their immediate families and preventing owners from renting their dwellings, the Association limits the interracial association of its members to those among racial minorities who can afford to buy. The exclusion of 56% of racial minority householders who rent denies members of the Association all opportunity for interracial association with that segment of the minority population. The policy requires those minority persons to find rental housing elsewhere, thereby perpetuating segregation. Kokomo will not achieve balanced living patterns until African American householders find their way out of Census Tract 2 into other areas of Kokomo. Kokomo can never achieve balanced living patterns so long as homeowners in Villas West II, whether white or black, segregate themselves so as to prevent all interracial association with 56% of all racial minority householders. Therefore, the policy of the Association in enforcing its restrictive covenant forbidding owners from renting their dwellings is

invidious under the Fair Housing Act independently of the extent to which it produces a disparate treatment on different racial groups. If our national commitment is to replace ghettos with truly integrated and balanced living patterns, each neighborhood, including Villas West II, must provide opportunities for racial minority householders who rent as well as for those who can afford to buy. Arlington Heights II., supra., 1290.

The trial court found,

> "The covenants limit interracial association between residents of Villas West II and householders of minority races to those householders of minority races who are able to buy homes in the subdivision, to the total exclusion of racial minority householders who could rent homes in the subdivision if homes were available." (Finding of Fact No. 28, Appendix p. 54).
>
> "The covenants along with similar covenants in other subdivisions have the effect of shifting the burden of the rental market and the attendant interracial association with minorities who live in rental houses to other neighborhoods." (Finding of Fact No. 31, Appendix p. 55.)

In abandoning the Arlington Heights II, supra, methodology, the Indiana Supreme Court obviates recovery on this basis because the court does not recognize the extent of the discriminatory impact on the communities, and there is no place for the

concepts of the perpetuation of segregation and prevention of interracial association in the Indiana Supreme Court's burden shifting process.

The State Court Has Decided an Important Question of Federal Law in a Way Which Conflicts With the Decision of the U. S. Court of Appeals

The Indiana Supreme Court has decided important federal questions arising under the Fair Housing Act in a way which conflicts with the decision of the United States Court of Appeals, Seventh Circuit, in Arlington Heights, II, supra.

Applying Arlington Heights, II, supra., factors, both the trial court and the Indiana Court of Appeals concluded that the Association's restrictive covenant violated the Federal Fair Housing Act because of its disparate impact on members of the African American community residing in Kokomo. Villas West of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1286 (Ind. 2008) (Justice Rucker dissenting). rehearing denied. Appendix p. 131.

The majority opinion of the Indiana Supreme Court acknowledges that federal district courts in the Seventh Circuit are obligated to follow the Arlington Heights, II, supra., methodology. However, the court states that the Indiana Supreme Court is not so restricted. Villas West of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1282 (Ind. 2008) rehearing denied. Appendix p. 122.

The Indiana Supreme Court abandons Arlington Heights, II, supra., approach of weighing factors and

adopts a method of burden shifting which accommodates two of the Arlington Heights, II, supra., factors by "considering the discriminatory effect of the challenged practice and the defendant's interest necessitating it." The court says,

> "In sum to establish a right to disparate impact recovery under the FHA, a plaintiff must establish a prima facie case by demonstrating that a policy or practice actually or predictably has a significant adverse or disproportionate impact on a protected class. To rebut this showing, the defendant must demonstrate that its policy or practice has a manifest relationship to a legitimate, nondiscriminatory interest. The plaintiff may then overcome the defendant's showing by demonstrating that a less discriminatory alternative would serve defendant's legitimate interest equally well." Villas West of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1283 (Ind. 2008) rehearing denied. Appendix, p. 124.

The Indiana Supreme Court does not compare and balance the impact of the discriminating practice on the protected class and on the community with the detriment to the defendant if the discriminating practice is discontinued. The Association's practice of restricting renters from the subdivision makes unavailable and denies dwellings within the

subdivision to 56% of racial minority householders. The no rent covenant has a manifest relationship to the Association's legitimate, nondiscriminatory interest of protecting property values in that "Owners who occupy their property have an incentive to improve and update because they can both enjoy the improvements and reap the fruits of their labor upon selling the home." Villas West of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1284 (Ind. 2008) rehearing denied. On the other hand, so long as the restrictive covenant remains in effect and African American householders rent dwellings, the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States (42 U.S.C. 3601) can never be achieved.

The Indiana Supreme Court does not recognize that there is a legitimate difference between the parties to assert their claims. The Association is a group of 149 private individuals who enforce the restrictive covenant as a means of protecting their property values. McGlothin has a different standing and a different mission.

No person can be prosecuted for an "unlawful act" under the Fair Housing Act. Enforcement of the Fair Housing Act is through civil remedies. This court recognized early on that because HUD has no enforcement powers and because the enormity of the task of assuring fair housing makes the role of the Attorney General minimal. the main generating force must be private suits in which complainants act not only on their own behalf but also "as private attorneys general in vindicating a policy that

Congress considered to be of the highest priority." Traffiante v. Metropolitan Life Insurance Company, supra, 211.

In her roll as "private attorney general", McGlothin vindicates the policy of the United States to provide for fair housing. By the Authority of this Court, McGlothin also sues to enforce the rights of the protected class. Gladstone Realtors v. Village of Bellwood, 441 U. S. 91, 103, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979).

In abandoning Arlington Heights, II, supra., as a precedent the Indiana Supreme Court imposes an impossible burden of proof on McGlothin and all other persons in Indiana who may be aggrieved under the FHA as the result of the discriminatory impact of a no-rent covenant. Under the decision, when the defendant asserts the general purpose of all homeowners associations to maintain property values, the burden shifts to the aggrieved person, the victim, to propose that the perpetrator of the unlawful act had an "equally effective, less discriminatory alternative." Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1283 (Ind. 2008) rehearing denied.

Please examine the Indiana Court's reasoning:

> "This record does not support a claim under a disparate impact theory. Although the specific property-maintenance covenants are a less discriminatory alternative to promote maintenance, the covenants are not an equally effective means of maintaining

property values. Maintaining property values involves not merely maintaining property but also improving and updating it. Under these covenants, owners are obligated only to maintain the home, not to improve or update it. Owners who occupy their property have an incentive to improve and update because they can both enjoy the improvements and reap the fruits of their labor upon selling the home.

"In a rental situation, however, this incentive is weakened because of divided ownership and occupancy. The renter lacks some incentive to improve the property because he or she would only benefit from the current enjoyment, not from an increased market value. **Because the additional property-maintenance covenants do not address the problem of divided interests in rental property, they are not an equally effective, less discriminatory alternative to excluding renters.** Moreover, although there is nothing in this record directly addressing the point, it seems obvious that an owner-occupant is both psychologically and financially invested in the property to a greater extent than

a renter.[10] Personal motivation can surely achieve better results than contractual compulsion in many cases. This is not a matter of reweighing evidence. Both parties' experts testified that owners maintain property better than do renters. (Tr. at 66, 86, 230-31.) Because the evidence on this point is undisputed, to the extent the trial court found these other covenants equally adequate to maintain property values, the trial court findings on this point are clearly erroneous.

"Because plaintiff points to no equally effective, less discriminatory alternatives to the defendant's legitimate nondiscriminatory policy, that policy does not support a disparate impact FHA violation, even if it has a disparate impact on a protected class." Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E.2d 1274, 1284 (Ind. 2008) rehearing denied. (emphasis added) Appendix, p. 126-127.

The Association is exonerated from its unlawful discriminatory conduct unless McGlothin can show that the Association has available an **equally effective,** less discriminatory alternative to

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[10] Surely, the psychology of this is recognized by prospective purchasers, who assess whether to make purchases based in part on exception that owner-occupant neighbors are likely to make such investments in maintenance.

maintain property values than the no-rent covenant. In examining the alternative covenants for equality, the Indiana Supreme Court divides the interests in the land as the ownership interest and the occupancy interest. The Court then concludes that no separation of the two interests will preserve property values equally as well as when the ownership interest and occupancy interest are held by the same person. The aggrieved person is now saddled with an impossible burden. Considering the risk that the court will award attorney's fees and costs to the offending party under 42 U.S.C. 3613(c)(2), the aggrieved person is foolish to champion the cause of the United States as a "private attorney general."

The Indiana Supreme Court ignores two realities. First, the Association has the power and the duty to enact covenants of its choice which can accomplish its purpose without racial discrimination. Second, there remains in reality the perception gleaned from history that property values are somehow maintained or enhanced because the covenant restricts 53% of Kokomo's African American population from the subdivision.

The Association is an organization of 149 private individuals who own homes in the subdivision. The Association has no power or authority to govern. Chief Justice Shepherd's opinion does not address the conflict of priorities between the purpose of the Association to maintain property values and the policy of the United States to provide for fair housing throughout the United States. 42 U.S.C. 3601.

Court created exceptions to the Fair Housing Act usually involve competing governmental interests

where each of the governing bodies is exercising powers within the scope of its governmental authority. The Arlington Heights II court warns,

> "The third factor which we find to be important is the interest of the defendant in taking the action which produces the discriminatory impact. **If the defendant is a private individual or a group of private individuals seeking to protect private rights, the courts cannot be over solicitous when the effect is to perpetuate segregated housing."** Smith v. Anchor Bldg. Corp., 536 F2d 231 (8th Cir. 1976) as cited in Arlington Heights II, supra., at 1293 (emphasis added).

The Arlington Heights II, supra., court directs the resolution of the conflict in its instructions to the district court on remand.

> "Since the village's zoning powers must give way to the Fair Housing Act, the district court should grant plaintiffs the relief which they request if it finds that the Act has been violated." Arlington Heights II, supra., at 1294.

Certainly, if a municipality's zoning powers to protect property values must give way to the Fair Housing Act, the contractual arrangements of a group of private individuals to protect property values must also give way to the Fair Housing Act. The policy of the United States is stated in the best interest of householders throughout the United States. The

purpose of the Association is stated in the best interests of owners of 149 lots within the subdivision. As the trial court found, "The purposes of the Association must give way to the policy of the United States." Appendix p. 58.

The United States Supreme Court Should Act to Decide Issues and Clarify the Law Pertaining To Disparate Impact Treatment Under the FHA.

The Indiana Supreme Court has decided important questions arising under the FHA that have not, but should be, settled by the U. S. Supreme Court. Justice Rucker emphasizes in his dissenting opinion that a uniform standard for determining liability based on disparate impact remains elusive. He refers to disparate impact jurisprudence as "an increasingly incoherent body of case law". Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E. 1274, 1286 (Ind. 2008) rehearing denied. (quoting Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin 841 N.E. 2d 584, 599 (Ind. Ct. App 2006) (quoting Peter E. Mahoney, The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair and Landing Law, and the Administration Principle, 47 Emory L. J. 409 (Spring 1998).

In referring to the Arlington Heights II, supra., precedent, Justice Rucker says, "Other than to make it exceedingly more difficult for legitimate victims of

housing discrimination to press their claims, I see no reason to abandon the precedent. Indeed, applying the Arlington Heights II factors, both the trial court and the court of appeals concluded that Villas West's restrictive covenant violated the Federal Fair Housing Act because of its disparate impact on members of the African American community residing in the City of Kokomo. I agree and would affirm the judgment of the trial court. Therefore, I dissent." Villas West II of Willowridge Homeowners Association, Inc. v. Edna McGlothin, 885 N.E.2d 1274, 1286, (Ind. 2008) rehearing denied.

It is time for the United States Supreme Court to revisit the Fair Housing Act and give guidance to a uniform methodology in disparate impact and discriminatory impact cases.

CONCLUSION

The Association's enforcement of a restrictive covenant preventing renting makes unavailable and denies dwellings within the subdivision to 56% of all racial minority householders in Kokomo, thereby perpetuating segregation and preventing interracial association. The covenant is invidious under the Fair Housing Act and must be declared void.

Imposing upon McGlothin the burden of proving an "equally effective less discriminatory alternative" to the no-rent covenant in protecting property values is unreasonable. The Association and its members violated the law. The Association and its members have the duty to act within the law. The harm is the denial of housing to a protected class because of race.

The harm to the protected class is the ongoing discriminatory impact which enforcement of the restrictive covenant has on the protected class and the Kokomo community.

The purpose of the Association to protect property values by a practice which restricts 56% of all minority householders from the subdivision can not take precedence over the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

For the reasons stated in this Petition, Appellant Shirley A. Ashcraft, Personal Representative of the Estate of Edna McGlothin, deceased, asks the Supreme Court of the United States to issue a writ of certiorari to the Indiana Supreme Court and, upon review, reverse the decision of the Indiana Supreme Court in this cause.

Respectfully submitted,

Joseph Henry Davis, Jr.
Counsel of Record for Shirley
A. Ashcraft, Personal
Representative of the Estate
of Edna McGlothin, deceased,
Petitioner